THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TERRY PARSONS,
Grievant,

v. **Docket No. 2011-1799-DOA**

GENERAL SERVICES DIVISION,
Respondent.

DECISION

Grievant, Terry Parsons, is employed by Respondent, General Services Division. On June 15, 2011, Grievant filed this grievance against Respondent, stating, "On June 14, 2011, Grievant denied representation in meeting with management." For relief, grievant seeks "[t]o be made whole, including written notification to all agency employees of the right to representation in meetings with those who can impose or recommend disciplinary action."

Following the July 15, 2011 level one hearing, a level one decision was rendered on July 22, 2011, denying the grievance. Grievant appealed to level two on August 4, 2011. Grievant perfected the appeal to level three of the grievance process on April 30, 2012. A level three hearing was held on September 6, 2012, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union, Respondent was represented by counsel, Stacy L. Nowicki, Assistant Attorney General. This matter became mature for decision on October 5, 2012, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant's representative was refused admittance to a meeting between Grievant, his immediate supervisor, and his second-level supervisor. The meeting was not investigatory or disciplinary in nature, and no discipline has been taken against Grievant for the conduct discussed at the meeting. The meeting was in the nature of a counseling session, and Grievant was informed prior to the meeting that the meeting was not disciplinary. Therefore, Respondent was not required to permit Grievant's representative to attend the meeting. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent as a Facilities Equipment Maintenance Technician (FEMT), and is assigned to perform work duties at the Capitol Complex.

2. On June 14, 2011, Building Operations Supervisor Larry LaRose, Grievant's immediate supervisor, directed Grievant to attend a meeting with Mr. LaRose and Operations and Maintenance Manager David Parsons.

3. Mr. LaRose informed Grievant that the meeting was not disciplinary.

4. Because Grievant had previously been issued discipline in meetings with Mr. LaRose and Mr. Parsons, he was concerned, so he called his union representative, Gordon Simmons.

5. Mr. Simmons appeared for the meeting, but Mr. Parsons would not permit him to attend.

6. The meeting proceeded without Mr. Simmons' attendance. Mr. LaRose, Mr. Parsons, and Grievant discussed emails Grievant had sent from his personal email on his own time regarding working conditions. These emails were sent to numerous people, from legislators to the newspapers, but were not sent to Mr. LaRose or Mr. Parsons. Grievant was not questioned about the emails. Mr. Parsons simply informed Grievant that these emails were embarrassing to the agency and would do nothing to correct the problems of which Grievant complained. Mr. Parsons informed Grievant that, in the future, he should follow the chain of command, to allow Grievant's supervisors an opportunity to address Grievant's complaints.

7. During the meeting no disciplinary action was threatened and no disciplinary action has been taken for the emails.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. Of Educ*., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

"An employee may designate a representative who may be present at any step of the procedure as well as at any meeting that is held with the employee for the purpose

of discussing or considering disciplinary action." W. VA. CODE § 6C-2-3(g)(1). The Grievance Board has additionally interpreted how this code section applies to an investigatory interview or questioning by finding that "[i]f the individual who conducts the investigatory interview or questioning is also the one who could decide or recommend disciplinary action, the employee has the right to representation during this conference or interview." *Knight v. Dep't of Health & Human Res*., Docket No. 2008-0981-DHHR (August 6, 2009). The Grievance Board later further interpreted this code section to find that "[t]he label given the meeting does not matter. If the topic of the meeting is conduct of the employee that could lead to discipline, the employee has a statutory right to have a representative present if requested." *Koblinsky v. Putnam County Health Dep't*, Docket No. 2010-1306-CONS (November 8, 2010). However, the decision specifically excepted "counseling sessions and evaluation meetings where the intent is solely to advise employees of issues related to their employment so that the employee may improve." *Id.* The employer need not allow a representative to attend counseling sessions or evaluation meetings, so long as the supervisor informs the employee that behavior discussed or revealed at the meeting will not lead to discipline. *Id.*

Grievant argues that, under *Knight* and *Koblinsky,* Grievant had a right to a representative at the meeting at issue. Grievant argues it is inappropriate to rely on an employer's subjective intention to determine if a meeting is disciplinary in nature. Grievant's argument ignores two important points: first, that there is objective criteria to determine if an action is disciplinary in nature, and second, the specific exception in *Koblinsky* of counseling sessions and evaluation meetings.

It is not just a question of the label attached to the meeting and the subjectivity of the impressions of both a grievant and an employer; it is a question of what actually happened. Those facts are ascertainable. In this case, prior to the meeting, Grievant was told it was not a disciplinary meeting, and, in fact, no disciplinary action was discussed or taken. The meeting was not about investigation, because everyone already knew what had happened. The testimony of everyone in this case, including the Grievant, showed that this was not about questioning or disciplining the Grievant, but rather discussing Grievant's actions and how they were ineffective for his purpose and detrimental to the agency. Further, Mr. LaRose informed Grievant prior to the meeting that it was not about discipline, satisfying the *Koblinsky* requirement. The facts in this case clearly show the meeting was in the nature of a counseling session and Grievant was informed it was not about discipline, so Grievant was not entitled to representation at the meeting.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. Of Educ*., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true

than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. "An employee may designate a representative who may be present at any step of the procedure as well as at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action." W. VA. CODE § 6C-2-3(g)(1). The Grievance Board has additionally interpreted how this code section applies to an investigatory interview or questioning by finding that "[i]f the individual who conducts the investigatory interview or questioning is also the one who could decide or recommend disciplinary action, the employee has the right to representation during this conference or interview." *Knight v. Dep't of Health & Human Res*., Docket No. 2008-0981-DHHR (August 6, 2009).

3. The Grievance Board later further interpreted this code section to find that "[t]he label given the meeting does not matter. If the topic of the meeting is conduct of the employee that could lead to discipline, the employee has a statutory right to have a representative present if requested." *Koblinsky v. Putnam County Health Dep't*, Docket No. 2010-1306-CONS (November 8, 2010). However, the decision specifically excepted "counseling sessions and evaluation meetings where the intent is solely to advise employees of issues related to their employment so that the employee may improve." *Id.* The employer need not allow a representative to attend counseling sessions or evaluation meetings, so long as the supervisor informs the employee that behavior discussed or revealed at the meeting will not lead to discipline. *Id.*

4. The meeting in which Grievant was denied representation was in the nature of a counseling session and Grievant was informed it was not about discipline, so Grievant was not entitled to representation at the meeting.

Accordingly, the grievance is DENIED**.**

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: January 14, 2012

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Billie Thacker Catlett
Administrative Law Judge